FILE COPY

JUN 3 193

CHARLES ELMORE

Supreme Court of the United States.

OCTOBER TERM, 1932.

No. 131

AMERICAN SURETY COMPANY OF NEW YORK Petitioner,

v.

TERESA MAROTTA.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

HARRY LeBARON SAMPSON,
Counsel for Petitioner
Boston, Massachusetts.

INDEX.

	PAGE
Petition for writ of certiorari	1
Summary statement of matters involved	1
Reasons relied on for the allowance of the writ	5
Prayer for writ	6
Brief in support of petition for writ of certiorari	8
I. The opinions of the court below	8
II. Jurisdiction of this court	9
III. Statement of the case	9
IV. Specification of errors	9
V. Argument	10
A. The decision of the Circuit Court of Appeals is based on a construction of the Bankruptcy Act which is in conflict with the decision of this Court in the case of *Coder* v. *Arts*, 213 U. S. 223.	13
B. The decision of the Circuit Court of Appeals for the First Circuit in the case at bar is in conflict with the opinion of the Circuit Court of Appeals for the Sixth Circuit in *Lansing Boiler & Engine Works* v. *Ryerson*, 128 Fed. 701.	16
C. The Court below erred in ruling that the term "creditors" as used in section 3a(1) of the Bankruptcy Act was confined to persons having a claim which would be provable in bankruptcy at the date of the transfer referred to in this section.	17
D. The Court below erred in ruling that the claim of the petitioner under the indemnity agreement signed by Teresa Marotta was not a claim provable in bankruptcy at the date on which she transferred her property.	19

PAGE

E. The Court below erred in failing to find and rule that the petitioner was entitled to maintain the petition and that Teresa Marotta was properly adjudicated bankrupt by the District Court. 20

The defenses claimed by the alleged bankrupt are not valid 21-24

F. The question involved is one of great importance. . 24

Conclusion 25

TABLE OF CASES CITED.

PAGES

Coder *v.* Arts, 213 U. S. 223 . . . . . 5, 13

Goodyear Vulcanite Co. *v.* Bacon, 148 Mass. 542 . . . 22

Inhabitants of Boothbay *v.* Giles, 68 Maine 160 . . . 32

Kepner *v.* United States, 195 U. S. 100, 124 18

Lansing Boiler & Engine Works *v.* Ryerson, 128 Fed. 701 6, 15, 16

Magee *v.* Manhattan Life Ins. Co., 92 U. S. 93 21

Maynard *v.* Elliott, 283 U. S. 273 20

McClellan *v.* Garland, 217 U. S. 268, 282 24

McLaughlin *v.* The Bank of Potomac, 7 How. 220 . . 15

Mowry *v.* Reed, 187 Mass. 174 15

In re Murphy, 225, Fed. 392 24

Photo Drama Motion Picture Co. Inc. *v.* Social Uplift Film Corporation, 213 Fed. 374 24

W. D. Reeves Lumber Co. *v.* Leavenworth, 248 Fed. 686 24

Smith *v.* Vodges, 92 U. S. 183 15

Thomson *v.* Crane, 73 Fed. 327 . . . . . 15, 19

United States *v.* Linn, 15 Peters 290 22

Washington *v.* Norwood, 128 Ala. 383 19

Whitehouse *v.* Bolster, 95 Maine 458 19

Yeend *v.* Weeks, 104 Ala. 331 19

TABLE OF STATUTES CITED.

	PAGES
Judicial Code, sec. 240, as amended by act of Feb. 13, 1925 (43 Stat. 936)	8
Bankruptcy Act (Act of July 1, 1898, c. 541, 30 Stat. 544; Apr. 12, 1900, c. 191, 31 Stat. 35; Feb. 5, 1903, c.487, 32 Stat. 797; Mar. 3, 1909, c. 269, 35 Stat. 838; June 25, 1910, c. 412, 36 Stat. 841; May 27, 1926, c. 406, 44 Stat. 662: U. S. Code, Title 11)	
Sec. 1 (U. S. Code, Title 11, c. 1, sec. 1)	10
Sec. 3a(1) (U. S. Code, Title 11, c. 3, sec. 21)	10
Sec. 59b (U. S. Code, Title 11, c. 6, sec. 95)	23
Sec. 63 (U. S. Code, Title 11, c. 7, sec. 103)	19
Sec. 67e (U. S. Code, Title 11, c. 7, sec. 107)	14

Supreme Court of the United States.

OCTOBER TERM, 1932.

AMERICAN SURETY COMPANY OF NEW YORK,
PETITIONER.

v.

TERESA MAROTTA.

No.

PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The American Surety Company of New York, a corporation organized under the laws of the State of New York, prays that a writ of certiorari be issued to review the judgment of the Circuit Court of Appeals for the First Circuit entered on the fourth day of April, 1932, in the cause in said Court between the above named parties.

Summary Statement of Matters Involved.

The cause in which this writ of certiorari is sought is a petition in bankruptcy originally brought by the petitioner, the American Surety Company of New York, in the District Court for the District of Massachusetts against Teresa Marotta, a resident of Winthrop, Massachusetts. The petition in bankruptcy was filed on July 16, 1930. The act of bankruptcy claimed is that the alleged bankrupt on March 18, 1930, and within four months next preceding the date of the petition,

transferred and conveyed certain real estate owned by her with intent to hinder, delay or defraud her creditors, including the petitioner (R. 1–5). The alleged bankrupt filed an answer denying that she had committed the act of bankruptcy alleged or that she was insolvent and denying that the petitioner was a creditor or had a provable claim against her (R. 5–6). The case was tried before a Special Master whose report is found in the record at pages 6–27. The District Court heard the case on the report of the Special Master and on the evidence taken before him, and on June 24, 1931, ordered that Teresa Marotta be adjudicated bankrupt (R. 36). The District Court made special findings of fact printed in the record at pages 37–45, but rendered no opinion. On appeal the Circuit Court of Appeals, by a final decree entered on April 4, 1932, reversed the decree of the District Court and instructed that court to dismiss the petition (R. 176). The material facts are stated in the report of the Special Master and the findings of the District Court (R. 6–27, 37–45). A summary statement of facts bearing on the issues raised by this petition follows.

On April 15, 1927, the alleged bankrupt, Teresa Marotta, executed an indemnity agreement introduced in evidence as exhibit 6 (R. 101), running to the petitioner, in which she agreed to indemnify the petitioner against any liability arising from the execution of a fireworks bond to the Commonwealth of Massachusetts on which Mario Mogliani was to be the principal and the petitioner the surety (R. 38). At the same time she signed a statement of her financial condition which showed as a part of her assets certain real estate in Boston and Winthrop, Massachusetts (R. 38–39, exh. 7, R. 107).

In reliance on this indemnity agreement and financial statement the petitioner became surety on the fireworks bond referred to in the indemnity agreement. The principal on the bond was Mario Mogliani. A copy of this bond, except for the fact that the copy does not show the seal of the petitioner which was on the original, was introduced in evidence as exhibit

1 and is found at page 93 of the record. This was a statutory bond required by Massachusetts statutes as a condition precedent to giving a permit for a public display of fireworks in Massachusetts (R. 39–40). This bond was filed in the office of the Treasurer and Receiver General of Massachusetts at some time before September 26, 1927 (R. 39–40). The condition of the bond was as follows:

> "The Condition of this Obligation is such that if the said Mario Mogliani d/b as Centredale Fireworks Company, his heirs, executors and administrators, successors and assigns, shall pay any judgment obtained in an action brought against the said Principal for discharging, firing-off, exploding or displaying fireworks at any public exhibition or exhibitions thereof, for or on account of any loss, damage, or injury resulting to persons or property by reason of the said discharging, firing-off, exploding or displaying of said fireworks, at said public exhibition or exhibitions; provided that said judgment is obtained in an action brought within a period of twelve months following the date of the public exhibition or exhibitions, at which the cause of said action is alleged to have occurred, then this obligation shall be void, otherwise it shall remain in full force and effect."

The bond was signed and sealed by the petitioner and was signed by the principal, Mario Mogliani, opposite the printed word "Seal" which appears on the bond, but bore no other seal of Mogliani. The petitioner intended to be bound by the bond in the condition in which it was filed (R. 40).

On September 26, 1927, one Beatrice Ricci was injured by the discharge of fireworks under the direction of Mogliani at a public exhibition of fireworks in Everett, Massachusetts. On April 12, 1928, Beatrice Ricci brought an action in the Superior Court for Middlesex County, Massachusetts, against the principal on the bond to recover for such injuries. On

March 4, 1930, the jury brought in a verdict in her favor in this action for $10,000 (R. 40–41). The alleged bankrupt, who had knowledge of this verdict through her husband, who was acting as her agent, on March 18, 1930, conveyed all her real estate, including that described in the petition in bankruptcy, to one Muollo. Muollo in turn executed two mortgages on parcels included in this conveyance for $8,000 and $20,000 respectively, and then conveyed all the property, subject to these mortgages, to Arcangelo Marotta, the husband of the alleged bankrupt, as trustee for the children of Arcangelo Marotta and the alleged bankrupt. The real estate conveyed belonged at the time to Teresa Marotta and was all the property which she had (R. 41–43).

All of these conveyances, including the mortgages, were made without any consideration. The District Court found expressly that the conveyances were made by the alleged bankrupt with specific intent by the alleged bankrupt to place the property conveyed beyond the reach of the petitioner and to hinder, delay and defraud the petitioner (R. 43).

At the time of these conveyances Teresa Marotta had no creditors other than the petitioner. At that time no judgment had been entered in the action brought by Beatrice Ricci against Mario Mogliani. The verdict of the jury in that action for $10,000 was reduced to $6,500 by order of the Court made on March 29, 1930, and judgment for the plaintiff was entered in this action on April 10, 1930, for $6,540.08 and costs (R. 11, 43–44). Counsel for Beatrice Ricci made an unsuccessful demand against Mogliani on an execution issued on this judgment and then made demand on the petitioner to pay it. On April 18, 1930, an action was brought against the petitioner in the Municipal Court of the City of Boston in accordance with statutory requirements on the bond filed with the Treasurer and Receiver General for the benefit of Beatrice Ricci. On the same day, after the suit was brought, the petitioner paid the amount then due on the Ricci execution, which was $6,653.78 (R. 43–44).

Before bringing the petition in bankruptcy, the petitioner had brought bills in equity in the Superior Court for Suffolk County, Massachusetts to set aside the conveyance made by Teresa Marotta. These bills are still pending (R. 44–45).

The District Court adjudicated Teresa Marotta to be a bankrupt. The Circuit Court of Appeals reversed this decision and ordered that the petition be dismissed. The decision of the Circuit Court of Appeals is based solely on the ground that a fraudulent transfer, to constitute an act of bankruptcy, must hinder, delay or defraud a creditor *holding a claim provable in bankruptcy at the time the transfer is made.* The Court held that in this case the petitioner had no provable claim on March 18, 1930, the date of the alleged transfer, and that, as there were no other creditors of Teresa Marotta on that date, the transfer was not an act of bankruptcy. The majority of the Court while conceding that a transfer made with a specific intent to defraud a contingent creditor or a subsequent creditor may be set aside at common law and under the statute of Elizabeth, held that such a transfer is not an act of bankruptcy under section 3a(1) of the Bankruptcy Act. Morton, J. dissented, contending that the first act of bankruptcy is identical with the classic fraudulent conveyance of the statute of Elizabeth and the common law.

Reasons Relied on for the Allowance of the Writ.

1. The decision of the Circuit Court of Appeals in this case is based on a construction of the bankruptcy act which is erroneous and is in conflict with the decision of this Court in the case of *Coder* v. *Arts*, 213 U. S. 223.

2. The decision of the Circuit Court of Appeals that the expression "conveyed, transferred, concealed or removed . . . any part of his property with intent to hinder, delay or defraud his creditors or any of them" as used in section 3a(1) of the Bankruptcy Act does not refer to the well known transfer in

fraud of creditors as defined at common law and the statute of Elizabeth, is in conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit in the case of *Lansing Boiler & Engine Works* v. *Ryerson*, 128 Fed. Rep. 701.

3. The question involved in the decision of the Circuit Court of Appeals as to whether a transfer by a debtor of all his property with a specific intent to defraud a creditor having at the time a contingent claim is an act of bankruptcy under section 3a(1) of the Bankruptcy Act, is of great importance in the general administration of bankruptcy and should be settled by a decision of this Court in order that there may be uniformity of decision throughout the United States on this question.

4. The decision of the Circuit Court of Appeals that the petitioner had no provable claim against Teresa Marotta on March 18, 1930, raises an important question as to the construction of the Bankruptcy Act which should be settled by the decision of this Court.

5. On the facts contained in the record and the provisions of the Bankruptcy Act which apply, the petitioner was entitled to have Teresa Marotta adjudicated a bankrupt and certiorari should be granted in order that the decision of the Circuit Court of Appeals to the contrary may be reversed and the decree of the District Court affirmed.

For a statement of the errors assigned by the petitioner reference is made to the assignment of errors contained in the annexed brief, which is made a part hereof.

Wherefore your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Circuit Court of Appeals for the First Circuit commanding that court to certify and to send to this Court for its review and determination on a day certain to be therein named a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 2647, *Teresa Marotta, Appellant*, v. *American Surety Company of New York, Appellee*, and that the said decree of

the Circuit Court of Appeals for the First Circuit may be reversed by this Honorable Court and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

AMERICAN SURETY COMPANY OF NEW YORK,

By HARRY LEBARON SAMPSON,
Counsel for Petitioner.

Supreme Court of the United States.

OCTOBER TERM, 1932.

AMERICAN SURETY COMPANY OF NEW YORK, PETITIONER.
v.
TERESA MAROTTA. } No.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE OPINIONS OF THE COURT BELOW.

The opinions in the Circuit Court of Appeals are printed at pages 167–175 of the record. The case has not yet been reported.

II.

JURISDICTION OF THIS COURT.

The jurisdiction of this Court is based on the Judicial Code, section 240, as amended by the Act of February 13, 1925 (43 Stat. 936). The material portion of this section is as follows:

> "(a) In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal."

The date of the judgment of the Circuit Court of Appeals which the petitioner seeks to review is April 4, 1932 (R. 176).

III.

STATEMENT OF THE CASE.

A concise statement of the case has been made at the beginning of the petition for certiorari. In the interest of brevity the facts there stated are not repeated in this brief.

IV.

SPECIFICATION OF ERRORS.

The petitioner contends that the Court below erred in the following respects:

1. The Court below erred in ruling that the transfer by the alleged bankrupt, Teresa Marotta, of all her property made with the specific intent to hinder, delay and defraud the petitioner, within four months of the filing of the petition, would not constitute an act of bankruptcy under section 3a(1) of the Bankruptcy Act unless the petitioner had at the time of the transfer a claim which would be provable in bankruptcy.

2. The Court below erred in ruling that the term "creditors" as used in section 3a(1) of the Bankruptcy Act was confined to creditors having claims which would be provable in bankruptcy at the date of the transfer referred to in said section.

3. The Court below erred in ruling that the claim of the petitioner under the indemnity agreement signed by Teresa Marotta was not a claim which was provable in bankruptcy at the date on which she transferred her property.

4. The Court below erred in failing to find and rule that the petitioner was a creditor of Teresa Marotta on March 18, 1930, the date of the transfer which she made.

5. The Court below erred in failing to find and rule that the conveyance made by Teresa Marotta on March 18, 1930, was

made with intent to hinder, delay and defraud a creditor and was an act of bankruptcy.

6. The Court below erred in failing to find and rule that the petitioner was entitled to maintain the petition and that Teresa Marotta was properly adjudicated bankrupt by the District Court for the District of Massachusetts.

V.

ARGUMENT.

This brief is directed to the question whether the writ of certiorari should be granted. Accordingly it will deal principally with the main points relating to the construction of the Bankruptcy Act on which the case turned in the Circuit Court of Appeals. Other issues raised in the case are discussed in this brief only to such an extent as may be necessary in order to preserve the rights of the petitioner to argue them more fully in case the petition is granted and the case is heard on the merits.

The material provisions of the Bankruptcy Act are:

> "Section 3. Acts of Bankruptcy.—a. Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed, or removed, or permitted to be concealed or removed any part of his property with intent to hinder, delay, or defraud his creditors, or any of them;... (U. S. Code, Title 11, c. 3, sec. 21: Act of July 1, 1898, c. 541, sec. 3, 30 Stat. 546).
>
> "Section 1. Meaning of words and phrases. The words and phrases used in this title and in proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows: (1) "A person against whom a petition has been filed" shall include a person who has filed a voluntary petition; (2) "adjudication" shall mean the date of the entry of a decree that the defendant, in a bankruptcy proceeding, is a bankrupt, or if such decree is

appealed from, then the date when such decree is finally confirmed; (3) "appellate courts" shall include the circuit courts of appeals of the United States, the Court of Appeals of the District of Columbia, the supreme courts of the Territories, and the Supreme Court of the United States; (4) "bankrupt" shall include a person against whom an involuntary petition or an application to set a composition aside or to revoke a discharge has been filed, or who has filed a voluntary petition, or who has been adjudged a bankrupt; (5) "clerk" shall mean the clerk of a court of bankruptcy; (6) "corporations" shall mean all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships and shall include limited or other partnership associations organized under laws making the capital subscribed alone responsible for the debts of the association, joint stock companies, unincorporated companies and associations, and any business conducted by a trustee, or trustees, wherein beneficial interest or ownership is evidenced by certificate or other written instrument; (7) "court" shall mean the court of bankruptcy in which the proceedings are pending, and may include the referee; (8) "courts of bankruptcy" shall include the district courts of the United States and of the Territories and possessions to which this title is or may after July 1, 1898, be applicable, the Supreme Court of the District of Columbia, and the United States Court of Alaska; (9) "creditor" shall include any one who owns a demand or claim provable in bankruptcy, and may include his duly authorized agent, attorney, or proxy; (10) "date of bankruptcy," or "time of bankruptcy," or "commencement of proceedings," or "bankruptcy," with reference to time, shall mean the date when the petition was filed; (11) "debt" shall include any debt, demand, or claim provable in bankruptcy; (12) "discharge" shall mean the release of a bankrupt from all of his debts which

are provable in bankruptcy, except such as are excepted by this title; (13) "document" shall include any book, deed, or instrument in writing; (14) "holiday" shall include Christmas, the Fourth of July, the twenty-second of February, and any day appointed by the President of the United States or the Congress of the United States as a holiday or as a day of public fasting or thanksgiving; (15) a person shall be deemed insolvent within the provisions of this title whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder, or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts; (16) "judge" shall mean a judge of a court of bankruptcy, not including the referee; (17) "oath" shall include affirmation; (18) "officer" shall include clerk, marshal, receiver, referee, and trustee, and the imposing of a duty upon or the forbidding of an act by any officer shall include his successor and any person authorized by law to perform the duties of such officer; (19) "persons" shall include corporations, except where otherwise specified, and officers, partnerships, and women, and when used with reference to the commission of acts which are herein forbidden shall include persons who are participants in the forbidden acts, and the agents, officers, and members of the board of directors or trustees, or other similar controlling bodies of corporations; (20) "petition" shall mean a paper filed in a court of bankruptcy or with a clerk or deputy clerk by a debtor praying for the benefits of this title, or by creditors, alleging the commission of an act of bankruptcy by a debtor therein named; (21) "referee" shall mean the referee who has jurisdiction of the case or to whom the case has been referred, or any one acting in his stead; (22) "conceal" shall include secrete, falsify, and mutilate; (23) "secured creditor" shall include a creditor

who has security for his debt upon the property of the bankrupt of a nature to be assignable under this title, or who owns such a debt for which some indorser, surety, or other persons secondarily liable for the bankrupt has such security upon the bankrupt's assets; (24) States shall include the Territories and possessions to which this title is, or may after July 1, 1898, be, applicable, Alaska, and the District of Columbia; (25) "transfer" shall include the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security; (26) "trustee" shall include all of the trustees of an estate; (27) "wage earner" shall mean an individual who works for wages, salary, or hire, at a rate of compensation not exceeding $1,500 per year; (28) words importing the masculine gender may be applied to and include corporations, partnerships, and women; (29) words importing the plural number may be applied to and mean only a single person or thing; (30) words importing the singular number may be applied to and mean several persons or things." (United States Code, Title 11, c. 1, sec. 1: July 1, 1898, c. 541, sec. 1, 30 Stat. 544; Apr. 12, 1900, c. 191, sec. 34, 31 Stat. 85; Mar. 3, 1909, c. 269, sec. 1, 35 Stat. 838; May 27, 1926, c. 406, sec. 1, 44 Stat. 662.)

A. The decision of the Circuit Court of Appeals is based on a construction of the Bankruptcy Act which is in conflict with the decision of this Court in the case of *Coder* v. *Arts*, 213 U. S. 223.

In *Coder* v. *Arts* the question arose as to whether a mortgage by a bankrupt to one of his creditors was made with the intent to hinder, delay and defraud creditors. It appeared that the bankrupt, when he gave the mortgage, was insolvent and knew it; that the mortgage in fact constituted a preference of the

mortgagee over other creditors; that the mortgagee had no cause to believe that the mortgagor was insolvent at the time; and that the mortgage was not made with any actual intent or purpose on the part of the mortgagor to hinder, delay or defraud his creditors. The claim was made by the trustee in bankruptcy that this mortgage was void under the following provisions of section 67e of the Bankruptcy Act:

> "e. All conveyances, transfers, assignments, or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this title within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration;"

In support of this contention it was argued that as the mortgagor knew that he was insolvent when he gave the mortgage, an intent on his part to hinder, delay or defraud creditors must be presumed, because this was the necessary effect of the mortgage. This Court was of the opinion, however, that the expression "with the intent and purpose on his part to hinder, delay or defraud his creditors" used in section 67e referred to those transfers which according to the common law and the Statute of Elizabeth were regarded as fraudulent, and that as a mortgage given to an existing creditor was not a fraudulent conveyance under the common law and the Statute of Elizabeth in the absence of an actual intent to hinder, delay and defraud, the mortgage in question was valid. In discussing this issue the Court said (213 U. S. 223, at p. 242),

> "We are of opinion that Congress, in enacting sec. 67e, and using the terms 'to hinder, delay or defraud creditors,' intended to adopt them in their well-known meaning as

being aimed at conveyances intended to defraud. In sec. 60 merely preferential transfers are defined, and the terms on which they may be set aside are provided; in sec. 67e, transfers fraudulent under the well-recognized principles of the common law and the statute of Elizabeth are invalidated. The same terms are used in sec. 3, subdivision 1, in which it is made an act of bankruptcy to transfer property with intent to hinder, delay or defraud creditors. Such transfers have been held to be only those which are actually fraudulent. It was so held in *Lansing Boiler & Engine Works* v. *Ryerson*, 128 Fed. Rep. 701. Considering the language, which is identical with that in sec. 67e, the Circuit Court of Appeals, speaking through Judge Severens, said:

'The language of subsection 1 of section 2 is the familiar language of statutes against conveyances fraudulent as against creditors, and we think there can be no doubt that Congress intended the words employed should have the same construction and effect as have for a long period of time been attributed to those words. *Githens* v. *Shiffler*, 112 Fed. Rep. 505.'"

It is clear in the case at bar that according to the common law and under the Statute of Elizabeth the transfer made by Teresa Marotta with the actual intent to defraud the petitioner was a transfer with intent to hinder, delay and defraud a creditor. This was recognized in both the majority and the minority opinions of the Circuit Court of Appeals (R. 172–174). A few of the decisions which support this proposition are cited below:

McLaughlin v. *The Bank of Potomac*, 7 How. 220.
Smith v. *Vodges*, 92 U. S. 183.
Mowry v. *Reed*, 187 Mass. 174.
Thomson v. *Crane*, 73 Fed. 327.

It is therefore clear that the majority of the judges in the Circuit Court of Appeals have departed from the definition of

what constitutes a transfer with intent to hinder, delay or defraud creditors which was adopted in *Coder* v. *Arts*, and have set up a new and narrower definition. It is submitted that certiorari should be granted in order to remove the confusion which will otherwise be created as to the construction of the portion of the Bankruptcy Act relating to fraudulent transfers.

B. The decision of the Circuit Court of Appeals for the First Circuit in the case at bar is in conflict with the opinion of the Circuit Court of Appeals for the Sixth Circuit in *Lansing Boiler & Engine Works* v. *Ryerson*, 128 Fed. 701.

In that case the issue was whether a mortgage given by a corporation was an act of bankruptcy under section 3a(1) of the Bankruptcy Act. It appeared that the corporation had given a mortgage of all its property to certain of its creditors to the exclusion of its other creditors, when it was known by its officers to be insolvent. The trial court held that under those circumstances the mortgagor must have intended to hinder and delay the other creditors, and refused to admit evidence as to the actual intent of the mortgagor. The Circuit Court of Appeals for the Sixth Circuit held that the conveyances which were made acts of bankruptcy by section 3a(1) of the Bankruptcy Act were those which were fraudulent by the common law and the Statute of Elizabeth and that as the mortgage in question would not have been fraudulent under them without proof of an actual intent to defraud, the ruling of the lower court was erroneous. This case, which rests squarely on the ground that the transfer with intent to hinder, delay and defraud which is referred to in section 3a(1) is identical with those transfers which were void under the common law and the Statute of Elizabeth, is inconsistent with the decision of the Circuit Court of Appeals in the case at bar.

It is submitted that it is essential to the proper administration of the Bankruptcy Act that there should not be two incon-

sistent interpretations of this section in effect in different circuits, and that the writ of certiorari should be granted in order that the proper interpretation may be settled by a decision of this Court.

C. The Court below erred in ruling that the term "creditors" as used in section 3a(1) of the Bankruptcy Act was confined to persons having a claim which would be provable in bankruptcy at the date of the transfer referred to in this section.

This point has been covered in part by the preceding portion of the argument. The following additional considerations are also submitted. Apparently the opinion of the majority of the Court below was based on the proposition that the word "creditor" is defined in section 1 of the Act as anyone who owns a demand or claim provable in bankruptcy, and therefore that the word must be so interpreted in the expression "hinder, delay or defraud his creditors or any of them" used in section 3a(1).

It is respectfully submitted that this conclusion is not supported by the provisions of the Bankruptcy Act or by the general rules of statutory interpretation which are applicable.

In the first place, it is to be observed that there is a careful distinction in section 1 of the Bankruptcy Act, in the use of the verbs "shall include" and "shall mean." Where Congress intended that a word should describe a definite class and no more, the verb "shall mean" has been used; and where Congress intended that a word should describe certain classes without any implication that it should exclude all others, the verb "shall include" has been used. For illustration, subsection 19 provides, "'persons' shall include corporations, except where otherwise specified; and officers, partnerships, and women, and when used with reference to the commission of acts which are herein forbidden shall include persons who are participants in the forbidden acts, and the agents, officers, and members of the board of directors or trustees, or other similar controlling

bodies of corporations;" It will be noted that although women are expressly mentioned in this subsection, men are not. No one has ever suggested, however, that this shows an intent to exclude men from the operation of the Bankruptcy Act. The reading of the entire section, which is printed in this brief at pages 10–13, will emphasize the distinction which has been stated.

In view of this distinction and of the fact that the verb "shall include" is used in subsection 9, which provides that "creditor" shall include anyone who owns a demand or claim provable in bankruptcy, it is submitted that there is no sound basis for the view adopted by the majority in the Circuit Court of Appeals that the word "creditors" in section 3a(1) must be limited in meaning to creditors having a provable claim at the date of the alleged act of bankruptcy.

The decision of the majority in the Court below also apparently overlooked the effect of the first four lines in section 1 which read as follows:—"The words and phrases used in this act and in proceedings pursuant thereto shall, *unless the same be inconsistent with the context,* be construed as follows:" (italics ours).

It is a well settled rule of construction that language used in a statute which has a settled and well known meaning, sanctioned by judicial decision, is presumed to be used in that sense by the legislative body.

Kepner v. *United States,* 195 U. S. 100, 124.

The expression "with intent to hinder, delay or defraud creditors" has such a well known meaning. Accordingly the word "creditors" in that expression, when interpreted consistently with the context, should be given the meaning which it is known to have as a part of that phrase. To give the word another meaning would be to interpret it so that it would be inconsistent with the context. The language used in the beginning of section 1 shows that no such interpretation was intended by Congress.

It is clear that at common law the petitioner was a creditor of Teresa Marotta from the date when it received the indemnity agreement and became surety on the fireworks bond.

Thomson v. *Crane*, 73 Fed. 327.
Yeend v. *Weeks*, 104 Ala. 331.
Washington v. *Norwood*, 128 Ala. 383.
Whitehouse v. *Bolster*, 95 Maine 458.

D. The Court below erred in ruling that the claim of the petitioner under the indemnity agreement signed by Teresa Marotta was not a claim provable in bankruptcy at the date on which she transferred her property.

The petitioner held an indemnity agreement under which Teresa Marotta had agreed to indemnify the petitioner against every claim arising from the execution of the proposed bond, and to place the petitioner in funds to meet the same before it should be required to make payment (R. 103, paragraph III). The petitioner contends that its claim, which is based upon the express contract of Teresa Marotta, is within the provisions of section 63 of the Bankruptcy Act. The material portion of this section is as follows:

> "a. Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; (2) due as costs taxable against an involuntary bankrupt who was at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice; (3) founded upon a claim for taxable costs incurred in good faith by a credi-

tor before the filing of the petition in an action to recover a provable debt; (4) founded upon an open account, or upon a contract express or implied; . . .

"b. Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against the estate." (Act of July 1, 1898, c. 541, sec. 63, 30 Stat. 562: United States Code, Title 11, c. 7, sec. 103.)

While the precise question has not been decided by this Court, the recent case of *Maynard* v. *Elliott*, 283 U. S. 273, establishes the proposition that a claim based on a contract is not necessarily barred from proof because it is contingent. In the case at bar the petitioner's claim was liquidated within one month from the date of the act of bankruptcy and before the petition in bankruptcy was filed. It is submitted that being a claim founded on an express contract it was a provable claim on March 18, 1930, the date of the conveyance made by Teresa Marotta, and also on July 16, 1930, when the petition in bankruptcy was filed.

E. The Court below erred in failing to find and rule that the petitioner was entitled to maintain the petition and that Teresa Marotta was properly adjudicated bankrupt by the District Court.

The opinion of the majority in the Court below failed to consider any points in the case except those which have already been discussed in the preceding portions of this brief. It is submitted that if, as has already been argued, the Court below was in error on these points, the decision of the District Court should have been affirmed. As this brief is directed principally to the question as to whether the decision of the Court below should be reviewed, the point now under consideration will be treated only in a summary way. The statement of the facts which

is contained in the petition for certiorari shows the execution of the indemnity agreement, the execution by the petitioner of the fireworks bond in reliance on this agreement, the filing of this bond, the breach of the condition of the bond, and the payment by the petitioner of the sum of $6,653.78 in satisfaction of its obligations under the bond. This payment was made on April 18, 1930, before the petition in bankruptcy was filed. It also appears that the alleged bankrupt, within four months of the filing of the petition, and in view of the impending liability of the petitioner upon the bond, and the corresponding liability of the alleged bankrupt, transferred all her property with the specific intent of hindering, delaying and defrauding the petitioner. If, as has already been argued, the objections which were raised by the majority in the Circuit Court of Appeals are not valid, it would seem that the petitioner is entitled to have Teresa Marotta adjudicated a bankrupt. As the assignment of errors filed in the District Court on behalf of the alleged bankrupt raised a number of other defenses, however, these will be discussed briefly.

These defenses and the answers to them are stated below.

1. The alleged bankrupt claims that she was induced to sign the contract of indemnity by fraud.

The answer to this contention is a double one. In the first place, there is no finding that any fraud was, in fact, practiced on her but, on the contrary, the finding of the District Court was that she knew the nature of the instruments which she signed (R. 39). The second answer is that her signature was procured by the principal on the bond and not by any representative of the petitioner, and the petitioner had no notice of any fraud practiced upon her. Under these circumstances, the defense of fraud cannot be maintained.

Magee v. *Manhattan Life Ins. Co.*, 92 U. S. 93.

2. The second defense claimed by the alleged bankrupt is that she was not bound by the contract of indemnity because

the fireworks bond did not have the seal of the principal attached.

The answer to this contention is that the petitioner intended that the bond should be delivered in the condition in which it was delivered and Teresa Marotta had expressly agreed by the terms of the indemnity agreement that if the petitioner executed the "suretyship hereinbefore applied for, or other suretyship in lieu thereof," she would be responsible for the suretyship described in the indemnity agreement, and "all alterations, renewals, extensions or modifications thereof which may be requested or assented to by the Principal named in such obligation" (Indemnity Agreement, R. 103). The principal signed the bond which was filed, and thereby assented to the form of it. Under these circumstances, it is clear that whether or not the bond which was filed corresponded exactly with the one described in the indemnity agreement, the indemnitor was bound to the petitioner. It is also clear that the petitioner under the circumstances had no defense on the bond on account of lack of a seal against the name of the principal.

United States v. *Linn*, 15 Peters, 290.
Goodyear Vulcanite Co. v. *Bacon*, 148 Mass. 542.
Inhabitants of Boothbay v. *Giles*, 68 Maine 160.

3. The third defense claimed by the alleged bankrupt was that the bond was not delivered to the State Treasurer of Massachusetts prior to the exhibition at which Beatrice Ricci was injured.

The answer to this claim is that the District Court has expressly found on the evidence that the bond was filed at some time before September 26, 1927, which was the date of the exhibition at which the injury occurred (R. 39–40).

4. The fourth defense claimed by the alleged bankrupt was that the petitioner was not a creditor of the appellant having a provable claim on March 18, 1930 and that as Teresa Marotta had no other creditors, the conveyance made by her on that

date could not have been made with intent to hinder, delay or defraud any creditor.

This defense has already been discussed in the preceding portions of this brief.

5. The fifth defense claimed by the alleged bankrupt was based on the contention that one creditor was not entitled to prosecute an involuntary petition in bankruptcy, unless there were other creditors in existence at the date when the petition was filed.

The answer to this contention is that the Act expressly authorizes one creditor to bring a petition when the creditors are less than twelve in number. As the Act does not establish any exception to the effect that a creditor cannot bring a petition unless there are at least two creditors, no such exception can properly be interpolated into the act. The provision of the Bankruptcy Act which applies is section 59b which reads as follows:

> "b. Three or more creditors who have provable claims against any person which amount in the aggregate, in excess of the value of securities held by them, if any, to five hundred dollars or over; or if all of the creditors of such person are less than twelve in number, then one of such creditors whose claim equals such amount may file a petition to have him adjudged a bankrupt." (Act of July 1, 1898, c. 541, sec. 59, 30 Stat. 561; June 25, 1910, c. 412, sec. 101, 36 Stat. 841: United States Code, Title 11, c. 6, sec. 95.)

6. The remaining defense which was claimed by the alleged bankrupt was that the petitioner was barred from prosecuting its petition in bankruptcy because it had begun an action in the state courts seeking to set aside the conveyances alleged to be fraudulent.

There are two answers to this contention. The first is that if the defense were otherwise valid, it would be in the nature of

a plea in abatement and would not be available to the alleged bankrupt, who has gone to trial on the merits without pleading it. The second answer is that the pendency of a suit in a state court is no bar to proceedings concerning the same matter in a federal court having jurisdiction.

McClellan v. *Garland*, 217 U. S. 268, 282.
W. D. Reeves Lumber Co. v. *Leavenworth*, 248 Fed. 686.

There is an additional reason for the application of this rule where, as in the case at bar, the relief sought in the federal court is one which that court alone has jurisdiction to give.

Photo Drama Motion Picture Co. Inc. v. *Social Uplift Film Corporation*, 213 Fed. 374.

In the case at bar the petitioner has offered to surrender for the benefit of the estate in bankruptcy any equitable attachment which the petitioner may have on the property fraudulently conveyed. A creditor who is ready to surrender any such attachment may properly be a petitioning creditor.

In re *Murphy*, 225 Fed. 392.

The proceedings in the state court were intended to preserve the property for the trustee in bankruptcy by guarding against the danger that it might be transferred to *bone fide* purchasers, and were not intended to be adverse to the interests of a trustee in bankruptcy who might be appointed.

F. The question involved is one of great importance.

It often happens that a debtor has a few small creditors whom he can readily pay, and a large contingent liability. Illustrations are found in the cases of sureties on probate bonds and fidelity bonds, persons who have entered into hazardous contracts which are being performed at the moment but which may prove in the future to be beyond their power to perform, and, in general, indemnitors against possibilities. The decision

of the Circuit Court of Appeals, if it is not reversed, leaves the door open for such persons to evade the Bankruptcy Act by paying off all debts presently due and transferring all their property before their contingent liabilities mature.

CONCLUSION.

It is respectfully submitted that for the reasons stated in the petition for certiorari and in this brief, this case calls for the exercise by this Court of its supervisory powers in order that the construction of the sections of the Bankruptcy Act in question may be settled, that the conflict may be removed which now exists as to what constitutes a transfer with intent to hinder, delay or defraud creditors within the meaning of the Bankruptcy Act, and that the right of the petitioner to maintain its petition in bankruptcy may be sustained; and that accordingly the writ of certiorari should be granted.

HARRY LeBARON SAMPSON,
Counsel for the petitioner.